IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

AMANTA S. MAIER,
Petitioner,
vs.
THE CONTINENTAL OIL COMPANY,
Respondent.
No. 326.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. ZWICK,
Ponca City, Oklahoma,
T. MORTON McDONALD,
DOUGLAS H. McDONALD,
Princeton, Indiana,
JOSEPH H. IGLEHART,
Evansville, Indiana,
Counsel for Respondent.

ELVIN H. HEWINS,
Evansville, Indiana,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

Page

Statement of the case 1

Summary of argument 8

Argument 10

First question presented 10

Second question presented 11

Third question presented 16

Fourth question presented 19

Fifth question presented 22

Conclusion 24

Appendix 25

Cases Cited.

Allen v. Powell (1917), 65 Ind. App. 601, 615-616 23

Automobile Underwriters v. Camp (1940 Sup. Ct. Ind.), 27 N. E. (2d) 370, 373 14

Block v. Sherman (1941 App. Ct. Ind.), 34 N. E. (2d) 951 ..... 8, 14

Busjahn v. McLean (1891), 3 Ind. App. 281, 283 19

Calton v. Lewis (1889), 119 Ind. 181, 183-184 ..... 17, 18

Craven v. Butterfield (1881), 80 Ind. 503, 513 19

Duckwell v. Kisner (1893), 136 Ind. 99, 101 23

First National Bank etc. v. Gough (1878), 61 Ind. 147, 151 17

General Talking Pictures Corp. v. Western Electric Co. (1938), 304 U. S. 177, 178 ..... 22, 23

Koons v. Burkhart (1918), 68 Ind. App. 30 ..... 8, 16

Lesh v. Johnston Furniture Co. (1938), 214 Ind. 176, 184, 13 N. E. (2d) 708, 711 16

Pulse v. Miller (1881), 81 Ind. 190, 191, 192..... 12
Ridgway v. Ingram (1875), 50 Ind. 145, 147, 148..... 12
Robbins v. Magee et al. (1881), 76 Ind. 381, 392-394..20, 21
Smith v. Ostermeyer Realty Co. (1935), 102 Ind. App. 164 .....8, 13, 14
Spencer etc. Club v. Bartmess (1919), 70 Ind. App. 294, 303 23
Spitler, Admr., v. James (1869), 32 Ind. 202, 210..... 23
Vincennes Savings and Loan Ass'n v. St. John et al. (1938), 213 Ind. 171, 180.....23, 24
Whipperman v. Dunn (1890), 124 Ind. 349, 357-358.... 17
Wilstach v. Heyd (1889), 122 Ind. 574, 578..... 12
Warner v. Marshall (1906), 166 Ind. 88.....8, 13

Statutes Cited.

Burns' Indiana Statutes Annotated 1933:
Sec. 33-101..... 12
Secs. 32-301 to 32-319..... 19
Sec. 32-301..... 25
Sec. 32-302..... 25
Sec. 32-303..... 25
Sec. 32-304..... 25
Sec. 32-312..... 27
1 R. S. 1852, Sec. 1, Ch. 42, Burns' Indiana Statutes Annotated 1933, Sec. 33-101..... 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

AMANTA S. MAIER,
Petitioner,
vs.
THE CONTINENTAL OIL COMPANY,
Respondent.
No. 326.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This is an action sounding in equity for rescission and cancellation of an oil and gas lease executed by petitioner to one J. H. McClurkin in his lifetime covering lands owned by her in Gibson County, Indiana, and by him assigned for value to the respondent without notice of any defect or infirmity. The respondent filed a counterclaim seeking a declaratory judgment upholding the validity of the lease.

There was a trial in the district court by the court without the intervention of a jury. The court made findings of facts and stated conclusions of law thereon, favorable to the petitioner. Judgment was entered thereon to the effect that the lease in question is null and void, and canceling the same, quieting petitioner's title to the real estate involved (R. 169-170), and dismissing respondent's counterclaim (R. 170-171).

On appeal by respondent to the Circuit Court of Appeals for the Seventh Circuit the judgment of the district court was reversed, Maier v. Continental Oil Co., 120 F. (2d) 237, with an opinion by Judge Kerner setting forth the facts (R. 199-206) and a concurring opinion by Judge Major (R. 206-208).

The petitioner has assumed to set forth in her petition three separately numbered statements of the "holdings" of the Circuit Court of Appeals, the third of which (probably inadvertently) includes a misstatement of the facts and of the record, to wit, "the lease was not invalidated by the act of respondent's assignor in changing the land descriptions after he had assigned the purported lease to respondent." The evidence is clear and undisputed, and the District Court found, that although the assignment of the lease in question is dated September 25, 1937 (R. 145-147), it was not executed by delivery to the respondent until some time in November, 1937 (R. 73, 145).

In the "Statement of Facts" included in her petition (p. 7) the petitioner again ignores the fact that the assignment of the lease was not delivered until "some time in November, 1937," leaving the impression that the assignment was delivered to respondent at the time of its date, to wit, September 25, 1937.

The petitioner has also assumed to set forth certain other facts in her petition under the heading "Statement of Facts," but in the opinion of respondent this statement is so incomplete and inaccurate that it does not correctly reflect the facts shown by the record.

Reference is made to "The lease form signed by Mrs. Maier on July 12, 1937, and retained by her," etc. (petition p. 5). This is simply the copy given petitioner by her lessee to be retained by her and which enabled her to be informed at all times as to just what she had signed. It is

not the lease which the Court of Appeals held valid and is not involved in any question of law decided by that court.

It is claimed that "the pasting" of the corrected descriptions to the face of the lease "was done without the knowledge or consent of the petitioner" (petition p. 6). True the "pasting" was done on September 29, 1937 (R. 200), without the prior knowledge of the petitioner; but true also her "lessee" wrote her a letter on September 28, 1937 (R. 48, 200), which she received on September 30, 1937 (R. 48, 53, 128, 200), telling her of the substitution of the corrected descriptions and enclosing her an exact copy thereof, and asking her to attach it to her copy of the lease "as the enclosed description is the one that will go on record" (R. 48, PX 4-A, offered R. 48). Petitioner put the list of corrected descriptions so received by her (PX 4-B, R. 48, offered R. 48) away with her copy of the lease (R. 58). Petitioner did not reply or write any letter in answer to said letter of McClurkin (R. 59).

Petitioner calls attention to the record in the recorder's office having been altered after recording (petition p. 8), but fails to state the fact that as so altered the record in the recorder's office is exactly like the lease (PX 3, R. 46-47, offered R. 46) and the corrected description sent to the petitioner by McClurkin and kept by her (PX 4-B, R. 48, offered R. 48).

Petitioner states (petition p. 9) that in December, 1938, E. J. Bergundthal, a lease buyer for respondent, called on petitioner bringing with him seven leases for petitioner's land. She neglects to state that this call was in response to an inquiry or request from her (R. 81-82, 85-86) in regard to a question of "selling royalty"; that the leases were not new leases, but simply "split up" the acreage into seven different tracts and all bore the original date, provided for the same royalty and delay rentals and were identical in terms with the original lease (R. 54-56).

Petitioner says (petition p. 9): "On petitioner's instructions the leases were taken to her attorney (R. 87). Petitioner refused to sign and execute these leases to respondent (R. 88, 89)." She neglects to state that an appointment was made by her and her attorney to discuss these new leases and the effect of a pro-rating clause with Bergundthal at the office of her attorney on December 16, 1938, but that the discovery well in the vicinity of this lease was drilled in on December 14, 1938, and plaintiff canceled the appointment and brought this suit on December 21, 1938 (R. 87-89).

The majority opinion of the Circuit Court of Appeals by Judge Kerner contains a statement of the salient facts involved in the case, which statement is borne out by the record and is not controverted by petitioner on any essential point. The facts so stated are as follows:

> "Appellee was the owner of more than 2,500 acres of land in Gibson County, Indiana, and on July 12, 1937, agreed with one J. H. McClurkin to give him an oil and gas lease upon the same (R. 40, 57, 82, 87). McClurkin at that time prepared a lease, in duplicate, without descriptions and left one copy with appellee (R. 40). July 27, 1937, at the request of McClurkin, she went before a notary public and executed the other copy of the lease, the body of which at that time contained no descriptions, but which had a paper containing various descriptions of real estate clipped or attached in some fashion to the back of it (R. 45-47). The list of descriptions attached to the lease was the same as a list delivered a few days earlier by McClurkin to the appellee with instructions to attach to her copy of the lease (R. 44-46). Appellee left the executed lease with the notary for delivery to McClurkin (R. 46, 62). September 28, 1937, McClurkin wrote the appellee as follows:
>
> > "'At the suggestion of the Abstracter corrections were made in descriptions in lease you exe-

cuted to us so as to eliminate mention of Forest reservations, and we ask that you kindly attach the enclosed corrected description on your copy of the lease, as the enclosed description is the one that will go on record.

"'We wish to thank you for your spirit of co-operation and we assure you that we shall do everything in our power to discover any oil pools in that area.

"'With kindest regards from both Mrs. McClurkin and myself, I beg to be

Most sincerely yours,

J. H. McClurkin.'

"Enclosed with his letter was a purported, corrected copy of descriptions exactly the same as a copy that was then placed in the body of the executed lease at the instance of McClurkin, in lieu of the list attached to the back of the lease (R. 47-48). Appellee received this letter on September 30th (R. 53). September 29th McClurkin, after removing the list of descriptions attached to the back of the lease and after having caused the corrected list of descriptions to be attached to the face of the executed lease, filed the same for record (R. 46-47).

"In Plaintiff's Exhibit 2 (the list clipped to back of executed lease) there are found at least fifteen separate descriptions, such as: 'Pt. NE¼ T 3 S 13 W 120A; Pt. NW¼ 21 T3 13 W A 1 A; Pt. SE¼ 20 T. 3 S 13 W 120-A' (R. 45). In the corrected list of descriptions, attached to the executed document (referred to throughout this proceeding as plaintiff's Exhibit 3) there are at least five similar descriptions. Examples are: 'Pt. of Sec. 1 T3 SR 14 W, containing 82.32 acres; Pt. of fract. Sec. 36 T. 2 SR 14 W containing 49.40 acres; Pt. of W. ½ of N. W. ¼ Sec. 4 T 3 SR 13 W, containing 1 acres' (R. 46-47).

"All descriptions had been obtained and prepared by McClurkin pursuant to his arrangement with the

appellee on July 12, 1937, when the forms of lease, except for descriptions, had been filled out (R. 40). At the time of the execution of the lease there had been no oil or gas development in the vicinity of the lands in question (R. 57), but thereafter McClurkin entered into negotiations with the appellant (R. 65-69, 84-85), and by a contract, dated August 24, 1937, granted appellant the privilege of conducting certain surveys upon the lands in question (R. 107-110). September 25, 1937, McClurkin executed an assignment of the lease to appellant (R. 50, 52). At the time of the assignment appellant knew nothing of any changes or alterations of descriptions in the lease (R. 70). This assignment was filed for record December 27, 1938 (R. 52).

"The lease provided, among other things, that if no well be commenced on the lands by July 12, 1938, the lease should terminate unless lessee should on or before that day pay to the lessor's credit in the Peoples Bank and Trust Company at Mt. Vernon, Indiana, the sum of $256.90, which should operate as a rental and cover the privilege of deferring commencement of a well for twelve months from said date (R. 46, 42). June 6, 1938, pursuant to the lease, appellant deposited to the credit of the appellee with said bank the sum of $256.90 which the bank credited to her account, and mailed a duplicate deposit slip to appellee showing that that amount had been deposited by appellant to appellee's credit and the purpose for which it was deposited (R. 73-74, 101-102). Appellee denied receipt of this (R. 96), but she did, however, each month receive from the bank a statement of her account, which showed all deposits to her account (R. 96). December 22, 1938, appellee, asserting that she for the first time gained personal knowledge of this payment, instructed the bank to return same to the appellant and the bank, accordingly, did so (R. 96, 102-103), but the appellant refused to accept it and redelivered same to the bank (R. 103-104). At the time of the execution of the lease McClurkin paid appellee $1.00, which she returned to McClurkin just prior to bringing this suit, but which

McClurkin likewise redelivered to appellee (R. 97, 100).

"From July, 1938, appellant, with the knowledge of appellee, carried on exploratory work in the nature of drilling core holes on the land covered by the lease and other lands in Gibson and Posey Counties, Indiana, at an expense of about $10,000 (R. 76-78, 79-81, 97-99). As a result of appellant's operations, a discovery well was brought in in the Gibson County oil field (not on appellee's land) December 14, 1938, and seven days later, on December 21, 1938, she filed the present suit (R. 57, 89). During this period and during the progress of the exploratory work appellee met and spoke to various representatives of appellant but, upon express instructions from her attorneys, intentionally refrained from disclosing to them the fact that she considered the lease invalid (R. 99, 79, 81, 86).

"In November, 1938, appellee sent for appellant's representative (R. 97). In response to her message two representatives called on her separately in December (R. 81, 85). She discussed with each of them the question of the sale of royalty on her land in Gibson County (R. 81, 82, 85, 86). She was informed by one of the representatives of the advantages of leases with prorating clauses and she had him take seven forms of leases to her attorney (R. 86, 87, 99). Arrangements were made for a conference to be held on December 16th between her and appellant's agent at her attorney's office, but the discovery well came in on December 14th and appellee canceled the appointment (R. 87-89).

"Plaintiff's Exhibit 2, attached to the back of the lease at the time of execution, recited a total acreage of 2568.66 (R. 45), and plaintiff's Exhibit 3, the lease with corrected descriptions, as recorded, recited a total of 2569.63 (R. 46-47). The corrected descriptions describe the same lands averred by plaintiff in her amended complaint to be the lands owned by her in Gibson County, which she could not more accurately

describe because no survey thereof had been made for her, and these lands are further averred to be the lands attempted to be described in the recorded lease (R. 4-6).

"The corrected descriptions include all of appellee's lands in Gibson County and describe the lands by sections, townships and ranges and by lots, and with acreage in the respective tracts, all as designated in the government survey. A survey made for appellee a few days prior to the trial of the case showed that the acreage had by accretion been augmented 393.54 acres over the acreage recited in plaintiff's Exhibit 3" (R. 63-65). *(Record references supplied.)*

SUMMARY OF ARGUMENT.

No special or important reasons have been shown why certiorari should be granted, nor does it appear that the Circuit Court of Appeals has decided an important question of local law probably in conflict with applicable local decisions.

I. No question was decided as to the petitioner's undelivered copy of the lease.

II. The land descriptions on the sheet attached to the lease form when it was executed were a part of the executed lease within the Indiana Statute of Frauds, because the lease form sufficiently referred to those descriptions, and also because the attachment of the sheet made the two attached papers one instrument. **Smith v. Ostermeyer Realty Co. (1935), 102 Ind. App. 164; Warner v. Marshall (1906), 166 Ind. 88; Block v. Sherman (1941 App. Ct. Ind.), 34 N. E. (2d) 951.**

III. As to the descriptions questioned, the lease is not subject to cancellation, since certain descriptions therein are admittedly valid. **Koons v. Burkhart (1918), 68 Ind. App. 30.** As to any incomplete descriptions therein, they

can be and were completed by oral proof; the portions of fractional sections described include all of the acreage, as shown by the government survey, in those fractional sections situated in Gibson County, Indiana; and the tracts in forest reserve are identifiable from county records.

IV. The alteration of the land descriptions was made to conform the instrument to the agreement and intention of the parties, involved no fraud, and neither rendered the lease invalid nor prevented respondent from asserting its rights under the lease. Cases relied on by petitioner are not in point.

V. The applicability of the doctrine of estoppel against petitioner, as stated in the concurring opinion of Judge Major, has not been raised in the petition for the writ, and that doctrine being shown to be applicable justifies the denial of the writ.

ARGUMENT.

The question arises at the outset whether this is a case where certiorari should be granted in any event. The facts presented do not show, and petitioner has not pointed out, any special and important reasons, such as are required by Rule 38 (5) of this court, why certiorari should be granted. Neither does it appear that the Circuit Court of Appeals has decided an important question of local law probably in conflict with applicable local decisions within the provisions of the same rule.

It is submitted that the following argument and the Indiana authorities cited, which deal with each question petitioner has sought to raise, in the same order presented by petitioner, show the decision of the Circuit Court of Appeals is in accord, rather than probably in conflict, with applicable Indiana decisions.

I.

The first question which is claimed to be presented in the petition for certiorari [p. 10, subd. (a)] is whether the Circuit Court of Appeals disregarded the applicable Indiana law in deciding that "the partly printed, partly written and partly blank lease form signed by petitioner, containing no description of the land purportedly leased, is valid and binding." No such question was discussed or decided by the Circuit Court of Appeals. That court, after stating that petitioner claimed the lease was void for lack of any description, proceeded to discuss and determine "whether the paper containing the descriptions attached to the lease is a part of the lease" (R. 203-204). This first question sought to be presented by petitioner is not in fact presented, and the Circuit Court of Appeals did not, as claimed, refuse to follow the three Indiana cases cited under subdivision (a) on page 11 of the petition, which cases hold a lease containing no descriptions invalid.

The argument in petitioner's brief on this question (subdivision B, pp. 17-19 of petitioner's brief) refers solely to the lease form signed by petitioner on July 12, 1937 (R. 40, PX 1, R. 41-44, offered R. 41), which was a copy left with and retained by petitioner (R. 40), who fastened and kept attached to it (R. 58) the copy of the original descriptions (PX 2, R. 45, offered R. 45). In her brief on this point petitioner claims that this is the lease held by the court to be valid. Such is not the case. The lease referred to by the court which it held to be valid was the original lease which was signed and acknowledged by petitioner July 27, 1937, before a notary public in Griffin, Indiana (PX 3, R. 45-46, 133-137, offered R. 46). That original lease was delivered to the original lessee, J. H. McClurkin (R. 62), and that is the lease which the Circuit Court of Appeals held valid because, when executed, it did contain descriptions of real estate, since the typewritten sheet of land descriptions then attached to it and referred to in it was a part of the lease.

II.

The second question claimed to be presented in the petition for certiorari [p. 10, subd. (b)] is that the Circuit Court of Appeals disregarded the applicable Indiana law in deciding:

> "That the typewritten sheet of land descriptions pinned or clipped to the signed lease form which is not referred to in the lease form or which typewritten sheet makes no reference to the lease form, constitutes a valid and binding lease."

The Indiana Statute of Frauds provides, in part, that:

> "No action shall be brought in any of the following cases * * *
>
> "unless the promise, contract or agreement upon which such action shall be brought, or some memo-

randum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, excepting, however, leases not exceeding the term of three (3) years."

Sec. 1, Ch. 42, 1 R. S. 1852, Burns' Indiana Statutes Annotated 1933, Sec. 33-101.

The cases relied upon by petitioner are cases claimed by petitioner to hold that descriptions contained in an instrument other than the contract of conveyance must be clearly referred to and identified by the contract signed by the party sought to be charged to be binding on such party under the Indiana Statute of Frauds [petition pp. 11-12, subd. (b)].

Those cases[1] as well as any other similar Indiana cases relied on (note 2, p. 19, petitioner's brief) all recognize the rule which is well settled in Indiana, that an instrument consisting of two separate writings is sufficient to comply with the Indiana Statute of Frauds and constitutes a single instrument if the signed writing refers to the other so that the intention to unite them appears, although only one of them is signed. That is what the Circuit Court of Appeals held in this case. The references in the lease proper to the real estate "described as follows" and "the above described land" and "said described land" were held to amount to sufficient references to the descriptions on the unsigned sheet attached to make them a part of the signed lease (R. 203-204).

The Circuit Court of Appeals further held (R. 203-204) that even if such references alone had not been sufficient, parol evidence properly established the fact that the descriptions on the attached sheet were intended to be and

1 Pulse v. Miller (1881), 81 Ind. 190, 191, 192;
Ridgway v. Ingram (1875), 50 Ind. 145, 147, 148;
Wilstach v. Heyd (1889), 122 Ind. 574, 578.

were a part of the signed lease. This was in accordance with the following applicable Indiana decisions, which hold that where the reference in one instrument to another is indefinite, parol evidence may be introduced to show what instrument is referred to and intended to be incorporated in the agreement:

Smith v. Ostermeyer Realty Co. (1935), 102 Ind. App. 164, 169, 197 N. E. 743, 745, 747;
Warner v. Marshall (1906), 166 Ind. 88, 107-110.

In **Smith v. Ostermeyer Realty Co. (1935), 102 Ind. App. 164, 169, 197 N. E. 743, 746,** a lease not signed by defendant was attached to a written guaranty which defendant did sign by which he agreed to guarantee the performance of the lease, which lease was inaptly referred to in the guaranty as "the lease hereinabove mentioned." In fact, it had not been mentioned before, although it was attached to the guaranty. It was held that the terms supplied by the lease were properly read into the guaranty. The court, in its opinion, said:

> "It has been held that the requirements of the statute are satisfied if the papers constituting the contract are physically joined, or the intention to unite them appears on the face of the papers. Graham v. Henderson Elevator Co. (1916), 60 Ind. App. 697, 111 N. E. 332. See, also, Olcott v. McClure (1912), 50 Ind. App. 79, 98 N. E. 82.
>
> "Parol evidence will be received for the purpose of showing contemporaneous facts, circumstances surrounding the parties, delivery of the contract and reason therefor. Beckwith v. Talbot (1877), 95 U. S. 289, 24 L. ed. 496; 27 C. J., Secs. 475 and 477, p. 384."

In the case of **Warner v. Marshall (1906), 166 Ind. 88, 107, 109, 110,** there had been extended correspondence relative to what was to be conveyed to plaintiff under certain conditions, and it was held that the various writings were

properly admitted in proof of the agreement. The court, in its opinion, said:

> "Where the reference is very general, and therefore indefinite, parol evidence may be introduced to show what instrument was referred to (citing cases). According to Bauman v. James, supra, it is sufficient, although the writing does not contain an express reference, if it can be said in the light of the facts that the prior writing, and nothing else, could have been referred to. Even where there is no direct reference to a prior writing, and the connection is not shown by parol evidence, the character of the writings may still be such as to show, upon their face when placed in juxtaposition, that they are connected (Beckwith v. Talbot [1877], 95 U. S. 289, 24 L. Ed. 496; Grafton v. Cummings [1878], 99 U. S. 100, 25 L. Ed. 366), and we are of opinion that we are within the cases in holding that a reference in general terms to an agreement or understanding may in some circumstances be inferred to have had reference to the only written agreement or understanding which is produced on either side upon trial (citing cases)."

The decision of the Circuit Court of Appeals that the descriptions on the sheet fastened to the lease constituted a part of the lease which petitioner signed and acknowledged is also supported by the rule of law recognized and applied in Indiana cases to the effect an unsigned writing attached to a signed writing at the time it is signed is a part of it and together they satisfy the statute of frauds.

Block v. Sherman (1941 App. Ct. Ind.), 34 N. E. (2d) 951, 953, 954;
Smith v. Ostermeyer Realty Co. (1935), 102 Ind. App. 164, 169, 197 N. E. 743, 746, 747;
Automobile Underwriters v. Camp (1940 Sup. Ct. Ind.), 27 N. E. (2d) 370, 373.

The case of **Block v. Sherman, 34 N. E. (2d) 951, 953, 954,** was decided by the Appellate Court of Indiana June 24,

1941. The opinion makes it plain that, while two writings which are not attached will not satisfy the statute of frauds unless there be some reference to the unsigned writing in the writing which is signed, that rule does not apply where the two writings are physically attached at the time of signing, since they constitute a single instrument. The court in its opinion said:

> "It is also well established that a memorandum may consist of several writings, although one writing only is signed, if the signed writing is annexed to the other writing by the party to be charged, or the signed writing refers to the unsigned writing so as to make it a part of the instrument which refers to it. * * *
>
> "In Browne on the Statute of Frauds, 5th Ed., Sec. 346b, on page 470, the author states: * * * 'It seems also that one signature may apply not only to the paper on which it is written, but also to another which at the time of signing was attached to it in such a way as to indicate that the whole was intended to be recognized by the signer as one paper.'"

Repeated claims by petitioner (p. 24 of her brief at the end of subdivision C) that there was no reference in the lease form to the attached descriptions wholly ignore the references specifically pointed out by the Circuit Court of Appeals in its opinion (R. 203).

The actual physical attachment of the descriptions to the signed lease at the time of execution is a circumstance which cannot be disregarded. Even if physical attachment did not in itself make the attached writing a part of the signed writing, that circumstance in the case at bar, taken together with the references in the signed writing and the fact that the descriptions are of land in the county named in the lease, show plainly as a matter of common sense that the two writings in fact constitute a single instrument. The petitioner and her attorneys in her amended complaint took the same view, and pleaded (R. 7) that the

lease as originally executed had the original descriptions inserted in its face in the appropriate place for them following the words: "described as follows, to wit:". This averment was not denied, but was expressly admitted, in respondent's answer (R. 17-18). As an admission by petitioner in her pleading this averment is to be taken as true without reference to any other evidence which may have been adduced, and she should be bound thereby. **Lesh v. Johnston Furniture Co. (1938), 214 Ind. 176, 184, 13 N. E. (2d) 708, 711.**

III.

The third question sought to be presented in the petition [petition p. 10, subd. (c)] is whether the Circuit Court of Appeals disregarded applicable Indiana law in deciding:

> "That land descriptions such as 'Pt of Fract. Sect. 36 T 2 SR 14 W containing 49.40 acres'; 'Pt. of W. ½ of NW ¼ Sec. 4 T 3 S R 13 W containing 1.00 acres'; 'Pt. fr. Sec. 6 T 3 S R 13 W containing 62.99 acres,' are sufficient identifications of land to demise it" (R. 204-205).

A. All but five of the thirty-three descriptions included in the corrected list attached to the face of the lease when recorded (PX. 3, R. 46-47, offered R. 46), were entirely complete descriptions according to section, township and range. No more sufficient descriptions of such tracts could possibly have been furnished.

For the lease to be valid it is not necessary that there be more than one valid description, and uncertainty in other descriptions would not make the entire lease invalid.

> **Koons v. Burkhart (1918), 68 Ind. App. 30, 37, 119 N. E. 820, 821-822.**

B. While it is not essential that there be more than a single sufficient description in the lease, under the facts disclosed by the record in this case the descriptions at-

tacked by petitioner in her petition [pp. 10-11, subd. (c)] were and are sufficient.

The cases relied on by the Circuit Court of Appeals (R. 204-205) sustain its conclusion that as to such questioned descriptions evidence which was admitted completed these descriptions and identified the property in question.

Much reliance is placed by petitioner (her brief, pp. 26-27) on the early case of **First National Bank etc. v. Gough (1878), 61 Ind. 147, 151,** which held a mistake in a description to be a mistake of law and not subject to correction. That case and similar early cases have been expressly overruled on this point. In the case of **Whipperman v. Dunn (1890), 124 Ind. 349, 357-358,** the Supreme Court of Indiana said:

> "It is contended by appellee, however, that the mistake in the description of the land covered by the mortgage set up in the cross complaint, was a mistake of law, and not a mistake of fact. In support of this position he cites Baker v. Pyatt, 108 Ind. 61, * * *; First Nat'l Bank etc. v. Gough, 61 Ind. 147, * * *
>
> "The case of Baker v. Pyatt, supra, is not an authority in favor of the position of the appellee. The other cases cited have been so far modified by subsequent decisions of this court that they can no longer be regarded as authority upon the questions now before us. Keister v. Myers, 115 Ind. 312; Calton v. Lewis, 119 Ind. 181."

Calton v. Lewis (1889), 119 Ind. 181, 183-184, cited by the Circuit Court of Appeals, was a case where suit was brought for breach of warranty in a deed which described one tract of land, but which omitted the name of the state (Tennessee) where the land was located. The court, in its opinion, said:

> "That part of a deed or contract which relates to the description of the premises should be liberally construed, so as to make the instrument available (Han-

non v. Hilliard, 101 Ind. 310), and a court will only declare a deed void for uncertainty when, after resorting to oral proof, it still remains mere matter of conjecture what was intended by the instrument. Roehl v. Haumesser, 114 Ind. 311, and cases cited. The omission to repeat the name of the state, after the recital that the land was situate in the County of Lawrence, was not, as is contended, a mistake of law. It is an error to suppose that a written instrument can only be corrected where the mistake results from the omission or insertion of words different from those agreed upon, or contrary to the expressed intention of the parties. It is a mistake of fact when, through ignorance, inadvertence, negligence or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did. The inquiry in such a case must be, what was the subject of the contract, not what words were agreed upon as descriptive of the land. Baker v. Pyatt, 108 Ind. 61; Keister v. Myers, 115 Ind. 312."

The undisputed evidence shows that the lands conveyed by deed from Virginia Miller on May 1, 1936 (DX 8, R. 91, offered R. 91), to petitioner and her husband who had since died (R. 96) were conveyed by the same descriptions as those in the corrected list pasted on the face of the lease as recorded (PX 3, R. 46-47, offered R. 46); and it is averred by petitioner in her amended complaint (R. 4-6) that the identical lands sought to be described in the lease as recorded are the lands owned by petitioner, which averment is admitted by respondent in its answer (R. 17-18).

It certainly cannot be contended that "after resorting to oral proof it still remains mere matter of conjecture what was intended by the instrument." Therefore an Indiana court will not declare the instrument void for uncertainty. **Calton v. Lewis (1889), 119 Ind. 181, 183**, quoted above.

C. Some of the descriptions questioned by petitioner [petition p. 10, subd. (c)] are of parts of fractional sec-

tions on the Wabash River, and these fractional sections have only parts of them in Indiana, all in Gibson County. Such descriptions describe and give accurately the acreage of such parts of those particular fractional sections as are in Gibson County, Indiana, exactly as shown in the government surveys, of which surveys and acreage the courts take judicial notice. **Craven v. Butterfield (1881), 80 Ind. 503, 513.** These descriptions are therefore sufficient.

D. The tracts described as "forest reserve" or "for. res." in the original list of descriptions (PX 2, R. 45, offered R. 45) covered tracts classified under, and accurately identifiable from public records required by, the Indiana Forestry Act of 1922, Burns' Indiana Statutes Annotated 1933, Sec. 32-301 to 32-319. (See Appendix.)

IV.

The fourth question said to be presented in the petition for certiorari [p. 11, subd. (d)] is whether the Circuit Court of Appeals disregarded applicable Indiana law in deciding "That the altering in a material respect of the land descriptions without petitioner's knowledge or consent did not invalidate the purported lease so as to bar respondent from affirmative relief."

The court concluded from the evidence and all reasonable intendments to be drawn therefrom that the alteration was made simply for the purpose of making the lease conform to the original intention of the parties (R. 206), and petitioner does not question this conclusion. Under such circumstances McClurkin was "impliedly authorized" to make the correction and previous actual consent to the alteration was not necessary. **Busjahn v. McLean (1891), 3 Ind. App. 281, 283.** An alteration for this purpose did not invalidate the lease under well established law in Indiana. Petitioner has cited no case to the contrary.

The fourth reason relied upon in the petition for the writ [p. 12, subd. (d)] is that the Circuit Court of Appeals

decided an important question of local law in conflict with applicable decisions of the appellate courts of Indiana, in that it refused to follow an Indiana decision said by petitioner to hold that "The material alterations of the descriptions made by McClurkin are presumptively fraudulent as to grantor-petitioner, and respondent can maintain no affirmative defense thereon," citing **Robbins v. Magee et al. (1881), 76 Ind. 381, 392-394.** That case does not so hold. The holding there is simply that it was error to overrule a demurrer to an answer which failed to deny or avoid an allegation in the complaint that certain of the defendants fraudulently altered a deed. Such failure was held to amount to an admission that the alteration was fraudulent. The court stated that a party could not secure affirmative relief upon an instrument which he had fraudulently altered. The case cited does not involve any question of presumption of fraud arising from an alteration, nor does it state any such rule. It merely deals with a situation where fraud was admitted. That case is not applicable because the situation in the present case involves no fraud. The district court made no finding that McClurkin's act in altering the lease was fraudulent; and the Circuit Court of Appeals in its opinion stated:

> "The argument of appellee, however, that the alterations were conceived in iniquity and amounted to fraudulent afteration of the instrument, we do not believe was warranted. The evidence with all reasonable intendments to be drawn therefrom points forcefully to the conclusion that McClurkin's acts in undertaking to correct the descriptions were merely for the purpose of carrying out the original intention of the parties" (R. 206).

The evidence fully supports this conclusion of the court. The very fact that McClurkin wrote petitioner a letter informing her of the alteration and enclosing an exact copy of the list of descriptions constituting the alteration

negatives any fraud (R. 47-48, 59). Petitioner does not contend otherwise, but seeks to rely upon a presumption of fraud upon the authority of a case which does not state any such rule. The Circuit Court of Appeals did not refuse to follow the decision of the Indiana court, **Robbins v. Magee et al. (1881), 76 Ind. 381, 392-394,** cited in the petition.

The brief cannot supply any deficiency in the petition, which is specifically limited in this instance to the holding of the single case cited (Petition p. 12). The other cases cited in section F of the argument in petitioner's brief (p. 30) speak of a presumptively fraudulent act, but there is no basis for a presumption of fraud in this case because the alteration was made to conform the instrument to the intention of the parties. The fact is there was no fraudulent act. **Robbins v. Magee et al. (1881), 76 Ind. 381, 392,** again is cited and quoted from, although it involved a situation where fraud was admitted, and all of the rules stated therein are based upon the fact that the alteration was admittedly fraudulent.

Nor is it a valid objection to the holding of the Circuit Court of Appeals on this point to say that some of the descriptions in the new list attached to the face of the lease were new and different. The only question is whether the new list brings the instrument into conformity with the intention of the parties to lease all of petitioner's lands in Gibson County, Indiana. The Circuit Court of Appeals states the fact to be that petitioner agreed to give McClurkin a lease on all her lands in Gibson County, Indiana (R. 199), and that the parties intended that the lease include all such lands (R. 204), and that the corrected descriptions include all petitioner's lands in Gibson County (R. 202).

We are unable to see the connection between the point here considered and the statement in petitioner's brief

(p. 31) that "The trial court found the facts in favor of petitioner in respect of the pretended lease being void." It did not so find. It made no finding with respect to any question of fraud, or on the question of the alteration being made to conform to the intention of the parties. Uncontroverted facts, omitted from petitioner's "statement of facts," clearly show the lease was valid.

V.

The petitioner's petition for the writ does not contain:

(a) Any statement of any question presented upon the concurring opinion of Judge Major that the petitioner is estopped to deny the validity of the lease;

(b) Any reason relied on for the writ based upon the ground that the concurring opinion of Judge Major to the effect that the petitioner is estopped to deny the validity of the lease is in conflict with the applicable decisions of the appellate courts of Indiana.

In this state of the record, no question is presented under subdivision G of "Argument" in petitioner's brief (Petitioner's brief pp. 31-33).

On petition for certiorari, the Supreme Court's consideration of the case is limited to the questions properly presented by the petition for the writ.

General Talking Pictures Corp. v. Western Electric Co. (1938), 304 U. S. 177, 178.

Both the opinion of Judge Kerner (R. 206) and the opinion of Judge Major (R. 206-208) show that the doctrine of estoppel was relied upon by respondent. The latter opinion will not be presumed to be contrary to the applicable law of Indiana, and petitioner has not properly presented any question with reference to this matter. Since Judge Major's opinion sustains the decision in favor of respondent, and is not properly questioned by the petition, this alone justifies the denial of the writ.

If, however, the specifications in the supporting brief can be relied upon to add to or expand the questions stated in the petition, contrary to the holding of the court in **General Talking Pictures Corp. v. Western Electric Co. (1938), 304 U. S. 177, 178,** the opinion of Judge Major, holding the petitioner estopped to deny the validity of the lease, is not in conflict with, but is entirely in harmony with, the decisions of the Supreme and Appellate Courts of Indiana upon that subject.

As pointed out by Judge Major: "In this connection it must be remembered that the defendant, as assignee of the lease, purchased the same in good faith for a valuable consideration and relied upon the record, which it had a right to do."

The assignment of the lease in question was not consummated until "some time in November, 1937" (R. 73), at which time it had been of record in Gibson County, Indiana, with the corrected descriptions, since September 29, 1937 (R. 46-47). Thereafter, on June 6, 1938, respondent deposited to petitioner's credit, in the bank designated by her in the lease as depository therefor, the sum of $256.90 as rental according to the terms of the lease (R. 73-74, 101-102), and from July, 1938, on until this action was commenced respondent was engaged in exploratory work at considerable expense, to the knowledge of petitioner and without protest or objection on her part (R. 76-78, 79-81, 97-99).

Clearly, under the authority cited in Judge Major's opinion (R. 208), **Vincennes Savings and Loan Ass'n v. St. John et al. (1938), 213 Ind. 171, 180,** as well as other applicable Indiana decisions, petitioner is estopped.[2]

---

2 **Spitler, Admr., v. James (1869), 32 Ind. 202, 210;**
Allen v. Powell (1917), 65 Ind. App. 601, 615-616;
Duckwell v. Kisner (1893), 136 Ind. 99, 101;
Spencer etc. Club v. Bartmess (1919), 70 Ind. App. 294, 303.

In conclusion, while petitioner's action "sounds in equity" there is nothing in the record which should appeal on petitioner's behalf to the conscience of a court of equity. Judge Kerner, in the majority opinion, calls attention to the fact that while petitioner met and talked with various representatives of the respondent during the time exploratory work was being carried on, "upon express instructions from her attorneys" she "intentionally refrained from disclosing to them the fact that she considered the lease invalid" (R. 201). In the opinion of Judge Kerner: "It would be inequitable and unjust to allow appellee, under the facts in the instant case, to take advantage of the fact that the list of descriptions had not been fastened and attached to the body of the lease" (R. 204). Judge Major, in his concurring opinion, clothes the same idea in the following language: "Under these circumstances, and others which might be related, it is my conclusion that a court of equity should not be utilized so as to enable the plaintiff to cancel the instrument in controversy, when she, by her acts and conduct, is largely, if not entirely, responsible for her asserted predicament. Vincennes Savings & Loan Ass'n v. St. John et al., 213 Ind. 171, 180; * * *" (R. 207-208).

It is, therefore, respectfully submitted that the petition for the writ of certiorari should be denied.

WILLIAM H. ZWICK,
Ponca City, Oklahoma,
T. MORTON McDONALD,
DOUGLAS H. McDONALD,
Princeton, Indiana,
JOSEPH H. IGLEHART,
Evansville, Indiana,
Counsel for Respondent.

ELVIN H. HEWINS,
Of Counsel.